IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6355 of 1988

With

SPECIAL CIVIL APPLICATION No 6347 of 1988

With

SPECIAL CIVIL APPLICATION NO. 6367 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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SAHDEVSINH J GOHIL & Ors.

Versus

RC DIMRI & Ors.

Appearance:

MR MK VAKHARIA for Petitioners.

Mr. Sudhir Mehta, AGP for Respondents

CORAM : MR.JUSTICE K.A.PUJ

Date of decision: 01/08/2002

ORAL JUDGEMENT

Since the common issue is involved in all these three petitions, the same are being disposed of by this common judgment.

2. What is challenged in these petitions is the order of dismissal passed by the respondent No.1 herein on 24th July 1988 with immediate effect. While passing this dismissal order, the respondent No.1 has dispensed with the inquiry in the purported exercise of the powers under sub-clause (b) of second proviso to clause (2) of Article 311 of the Constitution of India and the respondent No.1 has also given reasons for dispensing with such inquiry.

3. The brief facts, giving rise to the present petitions are that the petitioners are Unarmed Police Constables serving in Bhavnagar District Police Force, Bhavnagar. The charge levelled against the petitioners was that in 1987 they had indulged in promoting and inciting agitational activities in the police force of Gujarat State. On 3-4-1987 between 20.00 to 20.30 hours the petitioners and their other associates organised meeting in Police Headquarters, Bhavnagar and addressed them regarding the incident of police firing in Sandhiawad, Bhavnagar on 31-3-87 and induced them to accept the decision of the association if any action was taken against the policemen. A telegram was also sent to the DSP, Bhavnagar giving ultimatum that if any action was taken by the Government against the police the police association will take 'hard action'. The authorities have therefore considered this action of the petitioners as an inducement to policemen to cause disaffection against the Government established by law and also instigated them to withhold their services and also to commit breach of discipline and thereby they have violated the provisions of Section 3 of Police (Incitement to Disaffection) Act, 1922.

4. It was further alleged against the petitioners that on 16-5-1987 and 17-5-1987 the petitioners and their associates had put on black ribbons on uniform while on duty in response to a call of strike given by petitioners association at Ahmedabad in protest against non-fulfilment of demand of pay and eight-hour duty and thus violated the above provisions of the Act. It was further alleged that on 26-6-87, the petitioners had instigated local policemen to go on strike from 27.6.87 and in response to a call of strike given by Mahamandal at Ahmedabad in order to press for their demand of more pay and nonacceptance of pay-scales of all State

employees. It was further alleged that the petitioners had also tried to contact S.T. staff at Bhavnagar to stop them to join police duties if the police strike materialised from 27.6.87. According to the respondent No.1 the aforesaid activities of the petitioners constituted conduct so totally unbecoming of the member of the police force of the State which would render them unfit to be retained as such member and hence while exercising the powers vested in respondent No.1 under Article 311 (2)(b) of the Constitution of India read with Proviso to Section 26 of the Bombay Police Act, 1951 and with Section 51 of the Bombay Police Act, 1951 the respondent No.1 had passed the order dismissing the petitioners from service as members of the police force of the Gujarat State with immediate effect and the said orders are under challenge in this petition before this Court.

5. Initially, the petitioners had filed appeal on 4th August 1988 against the impugned dismissal orders before the Deputy Inspector General of Police, Saurashtra South Range, Junagadh. However, the petitioners had apprehended that the respondent No.2 before whom such appeals were filed would either delay the disposal of the appeal or he would dismiss the said appeal, under the influence of or under the instructions of the State Government. The petitioners have therefore filed the present writ petitions before this Court challenging the said order of dismissal.

6. It is pertinent to note that though the petitions were filed some time in October 1988, no order was passed by this Court till 8-3-1991. In the meantime, the petitioners' appeals which were filed before the respondent No.2 were decided by him vide his order dated 6.2.1990 whereby he had revoked the impugned dismissal orders passed against the petitioners on the condition that the petitioners should file a written undertaking to withdraw any suit, case, Special Civil Application etc., if any filed by them in any court of law in connection with the impugned order of dismissal or against Government/department. On these conditions, the petitioners were ordered to be reinstated at their respective posts. It was further made clear in the said order that the period of absence from the date of dismissal to the date of reinstatement was treated as extraordinary leave for which no pay and allowance would be admissible.

7. The petitioners had accordingly filed written undertaking before the respondent authorities and they

were taken back in their service.

8. However, instead of withdrawing the petitions filed by them before this Court and which were pending, the petitioners have moved an amendment in the respective writ petitions stating that the impugned part of the order dated 6.2.90 requiring the petitioners to give an undertaking to withdraw any suit, case or special civil application, if any filed by the petitioners in any Court of law in connection with the impugned order of dismissal or any proceeding against the Government/department, was illegal, unjust, improper and against the public policy. It was further stated in the amendment that the said part of the impugned order puts an embargo upon the right of the petitioners to question the impugned order or disadvantages arising out of the impugned order of dismissal. The petitioners have further stated in the amendment that the impugned action of the respondents in disallowing the petitioners from challenging the impugned order of dismissal in so far as it deprives the petitioners of their salaries for the aforesaid period was in violation of Articles 14 and 16 of the Constitution and was therefore required to be quashed and set aside. The amendment was granted by this Court on 8.4.1991. However, the interim relief was granted to the effect that the respondents were restrained from terminating the services of the petitioners except in accordance with law.

9. The respondents have filed their appearance and affidavit-in-reply was also filed by Deputy Superintendent of Police, Headquarter, S.P. Office, Bhavnagar. In the affidavit-in-reply, it was specifically stated that the petitioners and their sympathizers have adopted a belligerent and militant attitude and incited and instigated loyal members of the force to resort to agitation or strike, and had given a setback to the process of normalization of discipline in police force and had also led to an uncontrollable situation resulting in breakdown of entire law and order machinery of the State. It was further stated that the petitioners have created difficulties and impediments to holding of inquiry leading to the situation of jeopardizing the life and security of loyal members of the force in general and it was for that reason that the respondents had dispensed with the inquiry. It was further stated that the petitioners have approached respondent authorities and requested them to take them to the job under certain terms and conditions and accordingly the respondent No.2 had revoked the impugned order with the condition that the petitioners should file

a written undertaking as referred to in the earlier part of this judgment. Accordingly the petitioners filed written undertaking on 12.2.1990 and they abided by the terms and conditions on which the dismissal order was revoked and the petitioners were ordered to be reinstated. After filing undertaking, the petitioners had resumed the duty on 24.2.1990. In this view of the matter, it was urged by the respondent-authorities that now there was no grievance against the respondent authorities and the petitioners should not be granted/demanded any continuity of service or pay or allowances or any other type of benefits for particular period. The respondent authorities have further requested that considering these facts the petitions are required to be dismissed with costs.

10. Heard Mr. M.K.Vakharia,ld.advocate appearing for the petitioners and Mr. Sudhir Mehta, ld. AGP appearing for the respondents. Mr. Vakharia has submitted that the petitioners had no grievance so far as the reinstatement by the order dated 6th February 1990 was concerned. The petitioners challenged the said order partly so far as it required the petitioners to give undertaking to withdraw any suit, case, special civil application if any filed by the petitioners in any court of law in connection with the impugned order of dismissal or any proceeding against the Government in connection with their dismissal. The petitioners have further challenged the said order insofar as it deprived the petitioners of their salaries and other allowances from the date of dismissal till reinstatement. Mr. Vakharia has further submitted that the petitioners were without job for a period of about more than 19 months and as soon as the petitioners came to know about the reinstatement with certain conditions, because of the situation in which they were put, they were compelled to accept the said order of reinstatement together with all the conditions mentioned therein. The petitioners had to succumb to all the conditions whether just or unjust and accepted the order of reinstatement because they were vulnerable to the situation in which they were put. Mr. Vakharia has further submitted that such sort of undertaking should not have been demanded by the respondent authorities as they are violative of the fundamental rights of the petitioners. In support of his contention, he has relied on the decision of the Hon'ble Supreme Court in the case of Secretary-cum-Chief Engineer, Chandigarh vs. Hari Om Sharma and Others (1998) 5 Supreme Court Cases 87, wherein it is held after considering the argument canvassed on behalf of the appellant to the effect that when the respondent was

promoted in stopgap arrangement as Junior Engineer-I he had given an undertaking to the appellant that on the basis of stopgap arrangement, he would not claim promotion as of right nor would he claim any benefit pertaining to the post, that the argument to say the least, is preposterous. Apart from the fact that the Government in its capacity as a model employer cannot be permitted to raise such an argument, the undertaking which is said to constitute an agreement between the parties cannot be enforced at law. If any unspecified condition is imposed by the Government the same is held to be invalid. The Hon'ble Supreme Court has held the undertaking obtained by the Government as illegal. It was further held that besides the Government being the model employer should not be permitted to rely on such undertaking. Mr. Vakharia has further relied on the decision of the Supreme Court in Nar Singh Pal vs. Union of India and Others, (2000) 3 S.C.C. 588. In this case, the appellant was initially engaged as a casual labourer in the Telecom Department. After working continuously for more than 10 years, he acquired temporary status. On 20.4.1992 he allegedly assaulted and threatened the gateman. Therefore by an order dated 20.5.1992 his services were terminated on the ground that in view of such conduct he was not deserved of, or competent, to be retained in service. However, he was given a certain amount by cheque as retrenchment benefit, which he accepted. Before passing that order only a preliminary enquiry was conducted but there was no regular inquiry affording an opportunity to him. Subsequently on 27.2.1998 he was acquitted in the criminal trial. After unsuccessfully approaching the departmental authorities and the courts below, the appellant approached the Supreme Court for relief against the termination of his service. The courts below had refused relief to him on the ground that the appellant had encashed the cheque through which retrenchment compensation was paid to him and that therefore it was no longer open to him to challenge his termination. Allowing the appeal, the Supreme Court held that like many other employees the appellant had to sustain himself, or, may be, his family members on the wages he got. On the termination of his services,there was no hope left for payment of salary in future. The retrenchment compensation paid to him, which was only a meagre amount of Rs. 6350, was utilised by him to sustain himself. This does not mean that he had surrendered all his constitutional rights in favour of the respondents. Fundamental rights under the Constitution cannot be bartered away. They cannot be compromised nor can there be any estoppel against the exercise of fundamental rights available under the

Constitution.

11. Mr. Vakharia has further relied on the decision of the Supreme Court in the case of Lt. Governor of Delhi and others v. Const. Dharampal and others AIR 1990 SC 2059, wherein services of the respondents were terminated because of participation in agitation. Some constables were reinducted in view of public controversy and in deference to views expressed in Parliament. Other similarly situated constables were also entitled to reinstatement and other consequential benefits, even after more than 15 years. In this context, the Hon'ble Supreme Court has held that for the purposes of seniority,promotion and retiral benefits, the entire period between termination and reinstatement shall be taken into account. Mr. Vakharia has further relied on the decision of the Hon'ble Supreme Court in the case of Central Inland Water Transport Corporation Ltd and another vs. Brojo Nath Ganguly and another, AIR 1996 SC 1571 for the proposition that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract,or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situation in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. The types of contracts to which the principle formulated above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the Court. They are opposed to public policy and require to be adjudged void.

12. Mr. Sudhir Mehta, ld. AGP has submitted that it is a case of gross indiscipline amongst the police force and actions were taken against as many as 175 members of the police force. Similar treatment is given to all these persons. Against dismissal orders passed, many of

them have challenged the said orders before this Court and on the basis of undertaking as well as imposing condition regarding period of absence from the date of dismissal to the date of reinstatement being treated as extraordinary leave for which no pay and allowances would be admissible, the orders of reinstatement were passed and subsequently as per the undertaking filed by many of them, the petitions which were filed before this Court were withdrawn. The petitioners cannot, therefore, be treated separately and granted any relief in this petition. If the undertaking filed by the petitioners is flouted in this manner, there is no sanctity of such undertaking and no employer would take any decision in favour of the employee on the basis of an undertaking which is flouted subsequently. He has further submitted that the authorities relied on by the petitioners are not applicable to the special facts and circumstances of the present case. He has therefore submitted that the petitioners do not deserve any relief from this Court and the petitions are required to be rejected.

13. I have considered the rival submissions of the parties. I have also considered the averments and submissions made by the petitioners in the petitions as well as in the affidavit-in-reply filed by the respondents. I have also given my serious thought to the authorities relied on by the petitioners in support of the claim made in the amendment to the petitions. What is important to be noted in these petitions is that the order of dismissal was passed on 24th July 1988 and the same was challenged in the present petitions on or about 9th September 1988. The present petitions were originally fixed for hearing on 29th September 1988 and thereafter the same were fixed on 6.10.88 and thereafter straightway to 26.2.1991. No order was obtained by the petitioners in between from this Court. In the meantime, the petitioners had approached the appellate authority before whom the appeals were filed and they were pending. The appellate authority had passed the order on 6.2.1990 insisting for filing of an undertaking and treating the period of absence as special leave. Pursuant to the said order, the petitioners have filed undertaking on 12.2.90 and they have resumed duty on 24.2.1990. After about one year, the amendment was moved and the same was granted by this Court on 9.4.1991. From this sequence of events, it appears that the petitioners have changed their mind subsequently after getting an order of reinstatement and moved an amendment making prayer with regard to payment of salary for the period during which the petitioners remained absent and also for continuity of service with all consequential benefits. This action of the

petitioners is nothing but flouting of undertaking which was given by them to the concerned authorities who passed the order of reinstatement in their favour. Had this undertaking been not filed, the appellate authority would not have passed the order of reinstatement and they would have preferred to wait for the decision of this Court in the petition which was pending at the time when such an order of reinstatement was passed by the respondent authority. There would not be any sanctity of an undertaking filed by a person who obtains an order in his favour by filing such an undertaking and subsequently flouts the same on the apparent reason of getting some more benefit from the proceedings which are pending before different forums, just as in the case on hand. With open eyes and with all seriousness, the undertaking was filed by the petitioners and invited an order of reinstatement in their favour. The petitioners have also resumed duties pursuant to the undertakings. As per true letter and spirit of the said undertaking, the petitioners were supposed to withdraw the petitions which were pending before this Court, but instead of doing so the petitioners had moved an amendment after one year in the present petitions and they have sought for the relief from this Court. In such a situation, the conduct of the petitioners cannot be said to be irreproachable. As a matter of fact, the amendment moved by the petitioners cannot be considered by this Court while granting relief in this petition as the main petition would have come to an end as soon as the order of reinstatement was passed and the undertaking was filed by the petitioners. If the petitioners would have any grievance against the finding regarding their absence having been treated as special leave and denial of pay and allowances for the period of their absence, the petitioners would have filed separate petitions before this Court making appropriate relief. Presently, the order of dismissal is not under challenge as the grievance raised against that order has already been redressed by the appellate authority. So the grounds available for challenge in the said order of dismissal were not available to the petitioners when they challenged the order of the appellate authority reinstating the petitioners on their filing undertaking and treating their absence as special leave during which period the pay and allowances were denied to them. This Court, therefore, does not think it proper to interfere in the order of reinstatement passed by the appellate authority on the basis of the undertakings filed by the petitioners.

14. As far as the authorities relied on by the petitioners, more particularly the decision of the

Hon'ble Supreme Court in the case of Secretary-cum-Chief Engineer, Chandigarh vs. Hari Om Sharma and others (Supra), there is no dispute or doubt about the proposition that if there is any unconscionable condition imposed by the Government, the same has to be held as invalid. The Hon'ble Supreme Court has found the condition imposed by the Government as an unconscionable condition to the effect that while promoting the respondent on a stopgap arrangement, an undertaking was obtained from the employee under which he would not be allowed to claim salary or any other benefit. Here in the present case, the undertaking obtained by the respondent authorities does not contain any unconscionable condition. As a matter of fact, the order of dismissal was passed against the petitioners and even if the petitions were pending before this Court the respondent authorities have considered the case of the petitioners and revoked the order of dismissal on humanitarian ground and insisted that they should file an undertaking before them under which they were to agree to withdraw the cases pending before any authority with regard to the said dismissal order. This condition is normally imposed while dealing with the matters which are pending before two different forums. It is done only with a view to see that no further proceedings would remain in connection with the matter which is disposed of by one authority. Once having agreed with the particular arrangement or understanding, neither party should be allowed to go beyond that arrangement or undertaking. The petitioners' action of moving an amendment and seeking further relief from this Court is nothing but going too far from the arrangement and understanding arrived at between the petitioners on the one hand and the respondent authorities on the other hand. The condition with regard to treating the period of absence as special leave and denial of pay and allowances for the said period can also not be considered to be unconscionable condition as admittedly the petitioners have not worked for that period and all other persons who were similarly situated and were dismissed from service and were reinstated on the same terms and conditions, were not granted such benefits. The decision of the Hon'ble Supreme Court in the case of Nar Singh Pal Vs. Union of India and others does not render any assistance to the petitioners as in that case the retrenchment compensation was accepted by the concerned employee but he has nowhere stated that he would not challenge the order of dismissal and in that context the Hon'ble Supreme court has held that acceptance of retrenchment compensation does not mean that he has surrendered all the constitutional rights in favour of the respondents.

Fundamental Rights under the Constitution cannot be bartered away. They cannot be compromised nor can there be any estoppel against the exercise of Fundamental Rights available under the Constitution. Here in the present case, in the undertaking itself the petitioners have accepted that they would withdraw the writ petition pending before this Court in connection with the order of dismissal passed by the respondent authorities. Once having availed the advantage of undertaking filed and on that basis, invited the order of reinstatement, it is not open for the petitioners to challenge the said order making some more prayers by way of an amendment in the present petitions. As far as the decision of the Hon'ble Supreme Court in the case of Central Inland Water Transport Corporation Ltd and another vs. Brojo Nath Ganguly and another, (Supra) is concerned, the observations made therein cannot come to the rescue of the petitioners, as in the present case it cannot be said that the order of reinstatement contained any such condition which can be said to be unfair and unreasonable bargain between the parties possessing wholly disproportionate and unequal bargaining power. The appellate authority has not employed any force in the petitioners' place to act in a particular manner. From the tenor of their order, it only indicates that if the petitioners want any particular favour and further want the revocation of the order of dismissal by the appellate authority,the same should be on the basis of certain terms and conditions to which the petitioners have unqualifiedly agreed. As far as the decision of the Hon'ble Supreme Court in the case of Lt. Governor of Delhi and Ors. v. Const. Dharampal and Others (Supra) is concerned, it is true that the Supreme Court has passed the order to the effect that for the purposes of seniority, promotion and retiral benefits, the entire period between termination and reinstatement shall be taken into account. However, in the present case, the order of dismissal was revoked only on the condition that the petitioners would file an undertaking before the appellate authority with regard to the withdrawal of the petition pending before this Court and only after filing that undertaking, the petitioners were reinstated. The petitioners have not challenged the said order of reinstatement for about a period of one year and while imposing the condition with regard to treating the petitioners' period of absence as special leave and denial of pay and allowances for the said period, the appellate authority has considered the fact that the order of dismissal is too harsh and looking to the misconduct involved on the part of the petitioners some lesser punishment was required which was imposed on the

above terms. Taking over all view of the matter, the appellate authority has passed the said order and hence it cannot be said to be unjust or unreasonable.

15. Having regard to the facts and circumstances of the case and having regard to the finding recorded hereinabove, I am of the view that the relief claimed by the petitioners by way of an amendment in the main petition cannot be granted to the petitioners. There is a cardinal principle of law, equity and justice that a person who demands equity and justice should also be equitable in his approach. As stated earlier, backing out from the undertaking can never be considered to be a equity and hence the Court is always slow in granting relief on equitable grounds when equity itself is violated. I, therefore, see no justification in the prayer made by the petitioners in the amended petition and hence the petitions fail qua the relief made in the amendment.

16. subject to the above, all the three petitions are dismissed. Rule is discharged in all the petitions. It is, however, made clear that since the order of dismissal was already revoked by the appellate authority and the petitioners are in service, no order is required to be passed in the main petition, so far as the said relief is concerned.

17. The petitions are accordingly disposed of with no order as to costs.

rmr. [K.A. Puj, J.]